UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 22

BERGEN FUNERAL SERVICE, INC.

Employer

and

CASE 22-RC-12826

LOCAL UNION 813, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The parties are in agreement that the appropriate unit herein should include approximately 13 full-time and regular part-time licensed funeral directors employed by the Employer at its Hasbrouck Heights, New Jersey facility, excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act. They disagree, however, as to whether 3 apprentice/trainee funeral directors¹ as well as one part-time embalmer should be included in the unit. The Petitioner, contrary to the Employer, seeks to include these 4 employees asserting that they share a community of interests with the licensed funeral directors. The Employer

Apprentice/trainees are referred to as residents when employed in New York State. The parties agree that the Employer's New York facility is not involved in this proceeding.

contends that the 3 apprentice/trainees are temporary employees with no reasonable expectation of employment once their apprenticeship program is completed and that the part-time embalmer does not perform the full panoply of duties and functions as other funeral directors and that, therefore, the 4 employees at issue herein should be excluded from the appropriate unit.

Based on the following facts and analysis, I find appropriate a unit which includes the embalmer but excludes the three apprentice/trainees and I will direct an election in that unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³
- 3. The labor organization involved claims to represent certain employees of the Employer.⁴
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

² A brief filed by the Employer has been considered.

³ The Employer is a New Jersey corporation engaged in providing funeral services from its 330 Boulevard, Hasbrouck Heights, New Jersey facility, the only facility involved herein.

⁴ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All full-time and regular part-time Licensed Funeral Directors and embalmers employed by the Employer at its Hasbrouck Heights, New Jersey facility, excluding all office clerical employees, professional employees, apprentice/trainees, managerial employees, guards and supervisors as defined in the Act.

II. Facts

1. The Employer's Operations

The Employer provides outsourcing services to funeral homes as well as direct funeral services, i.e., it removes bodies⁵ from the place of death and transports, embalms and conducts burial services from its Hasbrouck Heights, New Jersey facility, the only location involved in this proceeding.

The Employer employs licensed funeral directors to perform its services which include making funeral arrangements, directing funerals, embalming and transporting bodies to cemeteries.

The Employer's president and owner, Scott Nimmo, the only individual to testify at the hearing, manages and supervises the Hasbrouck Heights location. Licensed funeral directors report to and are dispatched out of Hasbrouck Heights.

A. Apprentice/Trainees⁶

The Employer maintains an Apprentice-Training Program whose guidelines are mandated by the State of New Jersey. New Jersey allows the Employer to have two trainees per facility. The trainees are required to perform 75 embalmings, 75 funerals and

_

⁵ The reference to deceased individuals as bodies reflects language used by the parties at hearing.

⁶ Referred to in this decision as either apprentices, trainees or apprentice/trainees.

25 funeral arrangements (arrangements entail the pre-funeral preparations including reaching a contract for services) all under the guidance of a licensed funeral director. This training program is a necessary requirement in obtaining licensure by the State. After the training program, a written and practical test is administered by the State as a condition for licensure. The Employer has a one year apprenticeship program which prepares the apprentice/trainees to become licensed funeral directors.

Currently, the Employer employs three apprentice/trainees, Raul Ferrandiz, Jennifer Lopez Ramos and Margaret Scura. Ferrandiz began his training program in February 2007 and is on track to complete the program in May 2008.⁷ Ramos started in March 2007 and is scheduled to complete her training in a "couple of months" as she had some previous training program experience at another Funeral Home before commencing with the Employer. Scura began in March 2007 in Hasbrouck Heights but since July 2007 has been employed primarily at the Employer's New York facility training under New York State guidelines. The record reveals that she performs some "transports" in New Jersey although the frequency and circumstances of such activities is not described. Transports refer to the picking up of a body from its location at a home, hospital or nursing home and delivering it to the Employer's facility for preparation.

The record discloses that the over the past 10 years, the Employer has employed approximately 10-15 apprentice/trainees.⁸ Of these, half left the training program before completion. Of the remaining half who completed their training, the Employer hired one

⁷ Ferrandiz's program will take more than a year as it "took him a couple of months to get his papers going," a reference to registering with the State Board of Mortuary Science which oversees apprenticeship programs like the Employer maintains.

⁸ Apprentice/trainees are usually obtained from recommendations or referrals from other funeral homes or from mortuary science schools.

as a full time funeral director. The Employer asserts that none of the apprentice/trainees have guarantees of future employment upon completion of their training program. The Employer's president and owner, Nimmo, testified that at the completion of their training and licensure, apprentice/trainees either move on to other positions or would be considered for employment with the Employer if a position was available. According to Nimmo there is no present intention of hiring any of the apprentice/trainees upon completion of their training. Significantly, there is no testimony or other evidence as to what the Employer communicated to these apprentice/trainees about future employment either when they were hired or at any other time which would indicate that their employment tenure was either uncertain or indefinite.

The record reveals that apprentice/trainees earn about \$12 per hour, while licensed funeral directors earn between \$23 and \$40 per hour, sign in and out like other employees, and work full-time, often in excess of 40 hours per week. Apprentice/trainees receive the same health benefits as other employees, all full-time employees including apprentice/trainees receive vacation, sick leave and personal day benefits. All employees are eligible to receive a commission for referring funerals to the Employer, receive the same safety training and are commonly supervised.

Apprentice/trainees perform similar duties to those performed by licensed funeral directors. In this regard, apprentice/trainees, like licensed funeral directors, transport bodies, embalm, arrange funerals and participate in funerals albeit under the guidance and

⁹ The Employer defines full-time employment as working 32 hours a week or more. Apprentice/trainees often work between 48 and 50 hour weeks as opposed to full-time licensed funeral directors who work 40 hour weeks. Additionally, apprentice/trainees are required to be on call at night unlike the licensed funeral directors.

¹⁰ Apprentice/trainees do not participate in the Employer's 401(K) plan as only employees employed more than a year are eligible.

direction of licensed funeral directors. Apprentice/trainees are required to submit a monthly report to the State Board of Mortuary Science as to their progress.

B. <u>Embalmer</u>

At issue in this matter is also the status of Roger Powell, a licensed funeral director, who is currently employed as a regular part-time embalmer, working two days a week for 16 hours. It appears that Powell was a full-time licensed funeral director until a few years ago when as a result of an automobile accident, Powell was rendered physically unable to perform the full panoply of funeral director functions and began working as an embalmer. As noted above, all licensed funeral directors and apprentice/trainees perform embalming work. The science of embalming entails the preservation of a body to hold-up to decomposition so a funeral can be performed. Powell, like other employees, signs in and out, is covered by the health plan, 11 and is supervised by Nimmo; but does not receive other benefits such as vacation, sick leave and personal days as he is not employed full-time. He earns \$25 per hour. It also appears that apprentice/trainees perform embalmings under his guidance and direction. Unlike other licensed funeral directors, Powell does not direct funerals, arrange for transportation, put memorial packages together, place newspaper notices, order death certificates or order cemetery plots.

III. ANALYSIS AND CONCLUSIONS

A. Status Of Apprentice/Trainees

As noted above, the Employer contends that the apprentice/trainees should not be included in the unit as they are temporary employees with no reasonable expectation of permanent employment. I agree.

-

¹¹ It appears that his contribution rate is different from that of full-time employees.

The Board has held that the test for determining the eligibility of employees asserted to be temporary is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). That is, in determining whether an employee classified as temporary is eligible to vote, the Board examines "whether or not the employees' tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created." *Marian Medical Center*, above at 128; see also *FWD Corp.*, 138 NLRB 386 (1962).

Based upon the above, and the record as a whole, noting that there is no evidence that apprentice/trainees were advised that the duration of their employment was indefinite at the time of hire and that the Employer could determine the anticipated end of their employment i.e., upon the completion of their one year apprenticeship program, I find that apprentice/trainees are employed for a definite duration and, therefore, are temporary employees. As the Board has held that temporary employees, as here, "hired for a finite, ascertainable term will likely will not have a community of interest with unit employees," I find the apprentice/trainees here do not have a sufficient community of interest with the other unit employees to qualify them to vote. *Marian Medical Center*, above at 128. Accordingly, I find that the apprentice/trainees are not eligible to vote in the election herein directed.

B. <u>Embalmer</u>

The Employer contends that the embalmer does not share a sufficient community of interest to warrant placing him in the appropriate unit. I disagree.

In arriving at an appropriate unit determination, the Board weighs "various community of interest factors," including:

"[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and time spent away from the employment or plant situs under State or Federal regulations; the infrequency or lack of contact, with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

Clearly, this is a case in which the sought-after embalmer (Roger Powell) shares certain interests with the Employer's other licensed funeral directors. He like the other unit employees is licensed and supervised by Nimmo. Powell, works at the same facility, on the same shifts, thus clearly interacting with other licensed funeral directors at that location. Although, as a result of an accident, Powell now exclusively performs embalming functions, the record reveals that all licensed funeral directors perform this function in providing the Employer's services of embalming bodies. It also appears that Powell, like other licensed funeral directors, directs apprentice/trainees in their training program. His \$25 per hour salary rate is within the \$23-\$40 range earned by the Employer's licensed funeral directors. Powell also participates in the Employer's health benefit plan, albeit as a part-time employee, his contribution rate is different. As to his not being eligible for vacation, sick leave and personal days, the record discloses that this is merely a result of his part-time status. I also note that the Petitioner seeks to include him in the unit, and I am mindful, that the Board has held that a petitioner's desire concerning the composition of the unit that it seeks to represent constitutes a relevant consideration, albeit not a dispositive one. Marks Oxygen Company of Alabama, 147 NLRB 228 (1964).

Base upon the above and the evidence as a whole, noting that Powell is a licensed funeral director who exclusively performs embalming, a function that all other unit employees perform among their other duties, works at the same location under the same supervision, I find that Powell shares a sufficient community of interest with other unit employees warranting his inclusion in the unit found appropriate herein.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacement, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 month before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for

collective bargaining purposes by Local Union 813, International Brotherhood of Teamsters.

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **August 28, 2007**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by September 4, 2007.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may

11

be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.Gov. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Newark, New Jersey this 21st day of August 2007.

/s/ Edward J. Peterson

Edward J. Peterson Acting Regional Director NLRB Region 22 20 Washington Place – 5th Floor Newark, New Jersey 07102